



STAFF REPORT

To: Bridger Canyon Planning & Zoning Commission

From: Amy Waring, Code Compliance Specialist

Subject: BCPOA Appeal regarding Theisen Garage
7850 Bridger Canyon Road

Hearing Date: December 11, 2008 at 9:00 am

Location: Gallatin County Courthouse – Community Room
311 W. Main, Bozeman, MT

BACKGROUND

On June 24, 2008, the Bridger Canyon Property Owners Association (BCPOA) filed an official complaint with the Gallatin County Planning and Compliance Departments alleging (**EXHIBIT A**):

- A. That a garage was built on the Theisen property at 7850 Bridger Canyon Road in violation of Section 14.4(b) of the Bridger Canyon Zoning Regulations, and
- B. The garage was not built in compliance with an approved Land Use Permit (LUP).

At the time the complaint was officially filed on June 24, 2008, construction of the garage had already begun. Upon investigation and consultation with the County Attorney's Office and Planning Director, the Code Compliance Specialist issued a decision on October 1, 2008 finding that 1) there does not appear to be reasonable cause to revoke the Theisen's Land Use Permit (L08-103) now, and 2) the Theisen garage was built in compliance with the terms of their approved LUP.

On October 5, 2008, the BCPOA appealed the October 1, 2008 Compliance decision. The appeal was timely.

COMPLIANCE FINDINGS

1. The Bridger Canyon Zoning Regulations were adopted on October 26, 1971 and subsequently amended.

2. The Theisen property is located at 7850 Bridger Canyon Road, Bozeman, Montana. The property is located on Tract A of COS 2174A, in the E ½, NW ¼, Section 31, Township 1 South, Range 7 East, Gallatin County, Montana.
3. The Theisen property is located in AE-PD-20 District of the Bridger Canyon Zoning District.
4. On July 31, 2007, the Planning Department approved Theisen's Land Use Permit (**L08-005**) for a new residence at 7850 Bridger Canyon Road with a condition that the "existing residence shall be torn down within six months of the completion of construction on the new residence." At that time the Planning Department also advised the Theisens that "Should you desire to keep any part of the existing residence intact, such as the garage, a land use permit for that structure must be obtained. That structure will be subject to all standards as defined by the Bridger Canyon Zoning Regulation. Any non-conforming status the original residence had is voided with the issuance of this permit." **EXHIBIT B**
5. On December 5, 2007, Andrew Daigle, Locati Architects submitted a cover letter with the Theisen's LUP application for the Accessory Structure (Garage). In this letter he states, "It is the property owner's intent to rebuild a portion of an existing non-conforming structure as an accessory building. This building is to be used in the daily agricultural operations as a repair shop and storage of agricultural equipment." **EXHIBIT C**
6. Based upon Mr. Daigle's representation in #5 above, the Theisen's intended use of the structure is a use allowed by right in the AE District (Section 6.2). Uses allowed by right include barns, corrals, and other out buildings and structures accessory to a residential dwelling and/or agricultural operations, including the cultivation of ground and raising of livestock.
7. On December 10, 2007, the Planning Department approved Theisen's Land Use Permit (**L08-103**) for an Accessory Building (Garage) at 7850 Bridger Canyon Road. This LUP allowed the Theisen's to retain the same 500 sq. ft. footprint as the original garage and also allowed them to make the structure taller. In accordance with the condition placed on L08-005, the residential portion of the nonconforming structure was to be torn down. **EXHIBIT D**
8. L08-103 authorized a 500 sq. ft. structure that is 12'-8" tall with a 6:12 roof pitch, and sided with natural wood horizontal lap siding and cedar shingles. Elevation drawings included with the LUP provide an accurate representation of what was constructed at the site.
9. Section 14 of the Bridger Canyon Zoning Regulations addresses nonconforming rights, including structures built prior to adoption of the zoning regulations that could not otherwise be built. Such structures are allowed to continue, provided they remain

otherwise lawful. Portions of Section 14.4 relevant to the Theisen property, and this decision include:

- a. No structure may be enlarged or altered in a way that increases its non-conformity.
 - b. Should such structures be destroyed by any means, in extent of more than 75% of its replacement cost at the time of destruction it shall not be reconstructed except in conformity with the provisions of this Regulation.
 - e. Building existing on the effective date of this Regulation which is non-conforming only as to setback from a public road may be expanded in any direction except closer to said public road.
10. The Theisen garage is located entirely within the 125-foot setback to Bridger Canyon Road, and is nonconforming with regards to setback. Pursuant to Section 14.4 (a) and (e), it is permissible to alter/expand the nonconforming structure as long as the structure is not moved closer to Bridger Canyon.
 11. L08-103 complies with Section 14.4 (a) and (e) because the structure was built up and not closer to Bridger Canyon Road. The nonconformity was not increased.
 12. When the Planning Department approved L08-103, they relied on the Theisen's representation of how the proposed construction complied with Section 14.4(b), as described in the December 5, 2007 letter from Andrew Daigle, Locati Architects. The analysis of compliance with the 75% construction cost standard was made with regards to rebuilding a 1500 sq. ft. home as opposed to a 500 sq. ft. garage. **EXHIBIT C**
 13. BCPOA voiced their concerns about the Theisen garage permit to Planning staff on March 12, 2008 (Doc 20) and March 25, 2008 (Doc 22). **EXHIBIT E**. Neither correspondence was sent to the Code Compliance Specialist as a formal complaint. Based upon advice received from the County Attorney's office in April 2008, the Planning Department did not revoke the Theisen's LUP, and it remains valid.
 14. On June 24, 2008, BCPOA filed a formal complaint about the Theisen garage with the Code Compliance Specialist. **EXHIBIT A** (Doc. 30)
 15. On June 24, 2008, the Code Compliance Specialist inspected the Theisen garage. Construction was well underway. **EXHIBIT F** (Doc. 36). Pictures of the original garage are included with Exhibit F provided for comparison.
 16. On July 24, 2008, the Code Compliance Specialist's inspected the Theisen garage. The structure was mostly complete. **EXHIBIT G** (Doc. 37)

COMPLIANCE DECISION & RATIONALE

17. On October 1, 2008, the Code Compliance Specialist determined the following **(EXHIBIT H)**:

- A. There does not appear to be reasonable cause to revoke the Theisen's land use permit for the garage now.

BCPOA alleges that the Theisen garage was built in violation of Section 14.4(b) of the Bridger Canyon Zoning Regulations, which provides that if a nonconforming structure is destroyed by any means, in extent of more than 75% of its replacement cost at the time of destruction, that it may not be reconstructed except in conformity with the provisions of the regulation. BCPOA alleges that the structure was rebuilt in excess of 75% of its replacement cost, and should have been constructed outside the 125-foot setback to Bridger Canyon Road.

In the October 1, 2008 decision, which is hereby incorporated in its entirety into this staff report, the Code Compliance Specialist stated, "Despite potential problems with the analysis of compliance with Section 14.4(b), and based upon advice received from the County Attorney's office in April 2008, the Planning Department did not revoke the Theisen's LUP, and it remains valid. The structure was built, and is largely complete."

The Planning Department issued L08-103 for the Theisen garage on December 10, 2008. Correspondence in the Theisen file shows that BCPOA was aware the permit was issued as early as March 2008. The BCPOA did not file an official complaint with the Code Compliance Specialist until June 24, 2008, approximately six months after the permit was approved and work had already started on the structure.

Pursuant to Section 17.4(c) of the Bridger Canyon Zoning Regulations, the Code Compliance Specialist must have reasonable cause to revoke the Theisen's LUP. The Code Compliance Specialist did not have reasonable cause to revoke LUP for the following reasons:

1. On July 31, 2007, LUP L08-005 was granted by the Planning Department allowing the Theisens to replace the primary residence located at 7850 Bridger Canyon Road conditioned upon the existing residence being torn down within six months of the completion of the new residence.
2. On July 31, 2007, the Planning Department advised the Theisens that they could apply for a land use permit if they desired to keep any part of the existing residence intact (i.e. the garage), and that the structure would be subject to all standards as defined by the Bridger Canyon Zoning Regulation. Planning also stated that any non-conforming status the original residence had is voided with the issuance of this permit **EXHIBIT B**

3. On December 10, 2007, LUP L08-103 was granted by the Planning Department allowing the Theisens to retain/rebuild the garage portion of the existing nonconforming residence as an accessory structure.
 4. The work completed on the Accessory Structure (Garage) complies with LUP L08-103 as granted and additional guidance provided by Gallatin County. (See 15 B below.)
 5. The Accessory Structure (Garage) is a use allowed by right in the AE District.
 6. The structure is located approximately 85 feet from Bridger Canyon Road, and does not present an imminent risk to public health and safety.
 7. At the time the complaint was formally filed, the Theisens had already begun construction of the accessory structure, and they should be allowed to rely on prior decisions and actions of Gallatin County.
- B. The garage was built in compliance with the terms of the approved LUP (#L08-103) and additional guidance provided by the Planning Department.

The Code Compliance Specialist's October 1, 2008 decision is hereby incorporated in its entirety into this staff report. L08-103 authorized a 500 sq. ft. garage located approximately 85'-2" from Bridger Canyon Road, within the 125-foot setback.

According to the approved permit, the structure is 12'-8" tall with a gabled roof, 6:12 roof pitch, and sided with natural wood horizontal lap siding and cedar shingles. Elevation drawings included with the LUP provide an accurate representation of what was constructed at the site. The original garage was only about 7 feet tall with a single slope roof. In order to build the structure as designed, the walls had to be made taller. The constructed garage complies with the approved height and design as depicted on elevation drawings in L08-103.

Prior to construction, the Theisens contacted the Planning Department on numerous occasions with questions about compliance with provisions of Section 14 of the Bridger Canyon Zoning Regulations regarding nonconforming structures. The Planning Department informed the Theisens that removing the roof and all the garage walls will destroy the non-conforming building in excess of 75% of the cost to rebuild, and additionally that removal of the foundation will destroy more than 25% of the structure, both of which would require the structure to be rebuilt in compliance with the Bridger Canyon Zoning Regulations.

During a June 24, 2008 inspection, the Code Compliance Specialist observed the topping slab which was placed over the pre-existing foundation, and new studs attached or sistered to the old studs. The new studs rested on top of the topping slab, and were attached to the old studs, which rest on the original sill plate. The attachment of new

studs to the old provided a structural connection to the foundation, and allowed the Theisens to raise and even the building height for the new roof.

These construction activities are described in an email from Andy Daigle, Locati Architects to the Code Compliance Specialist on July 25, 2006. **EXHIBIT I** (Doc 32). Mr. Daigle's email states that two layers of siding were removed during construction (an outer layer of metal and an inner layer of wood lap siding), and that there was no sheathing (plywood) used in the initial construction. Since there was no sheathing, all that remained when the siding was removed were the studs.

The verbal and written descriptions of construction methods employed on site track with the Code Compliance Specialist's on site observations. To a person driving by on Bridger Canyon Road, without specialized knowledge of the construction methods employed, it may appear as if the entire structure was replaced with new construction. However, that is simply not the case. The garage was built in compliance with the terms of the approved LUP (#L08-103) and additional guidance provided by the Planning Department.

APPEAL

18. On August 11, 2008, the BCPOA submitted an appeal prior to a written decision by the Code Compliance Specialist regarding the Theisen garage. This appeal alleges that failure of the zoning enforcement agent to act constitutes a de facto decision and denial of their complaint. **Exhibit J**

Compliance Response: Section 17.5 of the Bridger Canyon Zoning Regulation provides that appeals from the *decision* of the Zoning Enforcement Agent concerning interpretation of this Regulation may be taken in writing to the Planning and Zoning Commission. The Code Compliance Specialist had not made a formal decision on August 11, 2008 and was in the process of consulting with the County Attorney's office on a response.

19. On October 5, 2008, the BCPOA appealed the Code Compliance Specialist's October 1, 2008 determination. **Exhibit K.** The appellants make the following claims:

A. Only the Planning and Zoning Commission may deny or even consider their appeal, not the Zoning Enforcement Agent or County Attorney. At the time BCPOA initially raised concerns about the structure in question, work had not commenced; the failure to issue a decision prior to the structures near-completion forecloses enforcement options and constitutes a de facto denial.

Compliance Response: BCPOA did not formally file a complaint with the Code Compliance Specialist until June 24, 2008 (**EXHIBIT A**), by which time work had already started on the structure. BCPOA voiced their concerns about the Theisen garage permit to Planning staff on March 12, 2008 and March 25, 2008 (**EXHIBIT E**).

However these inquiries were categorized as informal working correspondence between BCPOA and Planning Staff, and were not brought to the attention of the Code Compliance Specialist as a formal complaint.

Section 17.4.(c) provides that upon receipt of a complaint, the Code Compliance Officer shall immediately investigate and take action as provided by the regulation. The Code Compliance Specialist inspected the Theisen garage on June 24, 2008, the very same day the complaint was received. Construction activities were well underway.

The Code Compliance Specialist continued to investigate the complaint, which included a second inspection, obtaining information from the Theisen's representatives regarding construction activities, and consultation with the County Attorney's Office. The result was the decision issued on October 1, 2008. (**EXHIBIT H**)

B. Appellants assert the following:

1. LUP L08-103 is invalid, and construction did not comply with the terms of L08-103.
 - a. Recycling lumber from the original structure does not constitute retention of walls, and thus, the construction fails to comply with the terms of the LUP.
 - b. The studs retained from the original walls have little economic value and play no structural role.
 - c. The existing walls were entirely removed at some point during construction. The old "sistered" studs rest on new sill plate lumber.
 - d. A wall is an assembly of framing, siding, and other materials, not merely a few studs. Siding and other materials were removed, thus no reasonable person could conclude that walls were retained.
2. The project violates the letter and spirit of Section 14.4(b), which requires that nonconforming structure destroyed by any means in excess of 75% of their replacement cost not be reconstructed except in conformity with the regulations.
 - a. The structure was newly constructed in its entirety, except for a cracked foundation that was restored with a concrete cap.
 - b. Token elements of the original framing retained have no monetary or structural value.
 - c. The new structure is substantially larger than the original in height and volume.
 - d. The value of the new structure is vastly greater than that of the original.

3. The LUP should have been issued through a commission hearing rather than by the Planning Department because the building was not clearly compliant with the Bridger Canyon Zoning Regulations (Section 17.2.3).

Compliance Response:

The Theisen garage was retained/rebuilt pursuant to LUP L08-103 granted by the Planning Department. The approved LUP provided plans and drawings depicting the proposed work on the garage. LUP L08-103 authorized the Theisens to construct a 500 sq. ft. garage that is taller than the previous structure, and provided a new roof design (gabled v. sloped). The increased height/volume is permissible under Sections 14.4(a) and (e) of the Bridger Canyon Zoning Regulations.

At the time the LUP was issued the Planning Department relied on Theisen's architect's representation of how the application complied with Section 14.4(b). The architect requested and was given additional guidance by the Planning Department (with advice from the County Attorney's office) that removal of the existing foundation, the roof and all the walls would not comply with Section 14.4(b).

The Theisen's capped the old foundation with a new concrete slab. They removed two exterior layers of siding, which left only the studs. No sheathing (plywood) was used in the construction of the original structure. The garage retained its pre-existing studs and a cracked foundation that was covered with a new cap. The Theisen's representatives will testify that the pre-existing studs still provide structural support.

Based upon the guidance given by the Planning Department (with the County Attorney's Office) to the Theisens, onsite observations, and from information provided by the Theisen's architect and builder, the Code Compliance Specialist determined that retaining the studs was enough to comply with guidance given from Gallatin County, namely that "all of the walls" could not be removed. Based upon this rationale, the Code Compliance Specialist determined that the Theisens complied with the terms of their land use permit.

Appellants assert that the LUP should have been issued by the Planning and Zoning Commission rather than the Planning Department in accordance with Section 17.2.3. Section 17.2.3 states, "For buildings which clearly comply with all of these regulations building permits may be issued by the Zoning Enforcement Agent in the name of the Planning and Zoning Commission." At the time the LUP L08-103 was approved, the Planning Department determined that the structure complied with the Bridger Canyon Zoning Regulation.

STAFF SUGGESTED ACTION

Section 17.5 of the Bridger Canyon Zoning Regulations provides that appeals from the decision of the Code Compliance Specialist concerning interpretation of this Regulation may be taken in writing to the Planning and Zoning Commission. Section 17.4(c) of the Bridger Canyon Zoning Regulations provides that, with reasonable cause, the Planning and /or Compliance departments may revoke any land use permit.

On October 1, 2008, the Code Compliance Specialist determined: 1) there does not appear to be reasonable cause to revoke the Theisen's land use permit for the garage now, and 2) the garage was built in compliance with the terms of the approved LUP (#L08-103) and additional guidance provided by the Planning Department.

The reasons to support a decision to affirm the Code Compliance Specialist's decision are fully described in the Compliance Decision and Rationale and Responses to the Appeal Arguments. They include, but are not limited to:

1. On July 31, 2007, LUP L08-005 was granted by the Planning Department allowing the Theisens to replace the primary residence located at 7850 Bridger Canyon Road conditioned upon the existing residence being torn down within six months of the completion of the new residence.
2. On July 31, 2007, the Planning Department advised the Theisens that they could apply for a land use permit if they desired to keep any part of the existing residence intact (i.e. the garage), and that the structure would be subject to all standards as defined by the Bridger Canyon Zoning Regulation. Planning also stated that any non-conforming status the original residence had is voided with the issuance of this permit. **EXHIBIT B**
3. On December 10, 2007, LUP L08-103 was granted by the Planning Department allowing the Theisens to retain/rebuild the garage portion of the existing nonconforming residence as an accessory structure.
4. The work completed on the Accessory Structure (Garage) complies with LUP L08-103 as granted and additional guidance provided by Gallatin County. (See 15 B below.)
5. The Accessory Structure (Garage) is a use allowed by right in the AE District.
6. The structure is located approximately 85 feet from Bridger Canyon Road, and does not present an imminent risk to public health and safety.
7. At the time the complaint was formally filed, the Theisens had already begun construction of the accessory structure, and they should be allowed to rely on prior decisions and actions of Gallatin County.

Based upon the reasons cited above, and pursuant to Section 17.4(c), the Code Compliance Specialist did not have reasonable cause to revoke the Theisen's LUP for the garage. Further,

the Code Compliance Specialist determined that retention of the studs for three walls and the original foundation complied with L08-103 and guidance given by the Planning Department.

Pursuant to Section 17.5 of the Bridger Canyon Zoning Regulation, the Planning and Zoning Commission should decide whether or not it agrees with the decision of the Code Compliance Specialist concerning interpretation of the Regulation, specifically that 1) reasonable cause did not exist to revoke the LUP, and 2) the Theisens complied with the terms of their land use permit. The Commission should then make findings to affirm, modify, or reverse the October 1, 2008 decision.

EXHIBITS

- A. June 24, 2008 BCPOA Complaint
- B. July 31, 2007 letter from Tim Skop to Mark Theisen regarding approval of L08-005, which requires dismantling of old structure
- C. December 5, 2007 cover letter from Andrew Daigle to Planning regarding LUP application for the garage (L08-103)
- D. L08-103 (Accessory Structure-Garage)
- E. March 12 & 25, 2008 correspondence from Deb Stratford to Ada Montague
- F. Inspection Photos
(June 24, 2008 by Amy Waring & photos of old structure by Ada Montague)
- G. Inspection Photos (July 24, 2008 by Amy Waring)
- H. October 1, 2008 Decision by Code Compliance Specialist
- I. July 25, 2008 email from Andrew Daigle to Amy Waring describing construction methods
- J. August 11, 2008 BCPOA Appeal
- K. October 5, 2008 BCPOA Appeal